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No. 93-518

In The
Supreme Court of the United States
October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

AMICUS CURIAE BRIEF OF NORTHWEST LEGAL
FOUNDATION IN SUPPORT OF PETITIONER

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18 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED.....	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT	2
A. The exactions are a per se taking.....	2
B. If the exactions are not a per se taking, they are a regulatory taking	3
1. The exactions do not substantially advance a government interest.....	4
a. <i>Nollan</i> requires a two prong nexus to show a regulation substantially advances a government interest.....	4
b. Tigard wants the land for recreation, not to address traffic and drainage impacts	7
c. The Oregon Supreme Court mis- construed and misapplied <i>Nollan</i>	8
2. Dolan has been singled out to bear the burden of providing land for recreation ..	10
3. Tigard's action shows the tendency of municipalities to use development approval to obtain benefits without cost..	12
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

<i>Dolan v. Tigard</i> , 854 P.2d 437 (Or. 1993)	1
<i>Loretto v. Teleprompter Manhattan CATV</i> , 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1983).....	2, 3, 4
<i>Nollan v. California Coastal Commission</i> , 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).....	<i>passim</i>
<i>Parks v. Watson</i> , 716 F.2d 646 (CA9 1983).....	9
<i>Pennsylvania Coal v. Mahon</i> , 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922)	4
<i>Yee v. Escondido</i> , 503 U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).....	2, 3

UNITED STATES CONSTITUTION

Fifth Amendment.....	5
Fourteenth Amendment.....	10

ORDINANCES

Tigard CDC 18.12.180.A.8	7, 10
--------------------------------	-------

MISCELLANEOUS

Delaney, Gordon and Hess, "Needs-Nexus Analysis", 50 Law & Cont. Prob. 139 (Winter 1987)	13
Note, " 'Take' My Beach Please!", 69 BUL Rev. 823 (1989)	13

I. STATEMENT OF INTEREST

The Northwest Legal Foundation (NLF) is a non-profit public interest law firm. It is dedicated to protecting constitutional rights associated with the ownership and use of private property. The NLF believes the respondent City of Tigard violated petitioner Dolan's constitutional right to use her property. The NLF submits this brief in support of Dolan.

II. SUMMARY OF ARGUMENT

This case is an example of a municipality abusing its power to regulate the use of land. The Oregon Supreme Court (OSC) misconstrued and misapplied this court's ruling in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), to uphold Tigard's actions. *Dolan v. Tigard*, 854 P.2d 437 (Or. 1993). Tigard imposed conditions upon Dolan without sufficient evidence (1) of impacts to justify denying her project, or (2) that the conditions it imposed will ameliorate the impacts Tigard claims will occur. Tigard wanted the land for recreation.

Tigard singled out Dolan to provide a benefit to the citizens of Tigard without compensating her, merely because she chose to exercise her right to develop her land located near Fanno Creek. This court should apply both the spirit and letter of *Nollan*, as well as the U.S. Constitution, by overturning the OSC.

III. ARGUMENT

A. The exactions are a per se taking

Tigard required Dolan to dedicate a 15' strip of land for a bike/pedestrian path, and another parcel in a flood plain, as a condition for approval of an expansion of an existing plumbing supply store. This will result in a compelled physical occupation, which is a per se taking.

A per se taking occurs when the government compels a landowner to consent to a permanent physical occupation of his land. *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 434-5, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1983). A permanent physical occupation occurs when individuals are given a right to pass along real property, even though no individual is permitted to permanently station himself upon the premises. *Nollan*, 483 U.S. at 832. A landowner has a right to build, and requiring him to yield property to exercise that right is not a voluntary exchange. *Id.* at 833-4, n. 2.

Here, Tigard is compelling Dolan to dedicate land so persons can pass along what is now her property, along with dedicating additional land in the flood plain for recreational use by the general public. This is equivalent to a permanent physical occupation. It would be a taking if Tigard required the dedications unilaterally and without compensation, regardless of the governmental interest the dedications would advance.

The OSC misconstrued *Yee v. Escondido*, 503 U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), in determining there was no compelled physical occupation. 854 P.2d at 441, n. 8. There was no compelled physical occupation in

Yee where the ordinance regulated mobile home park tenancies, but did not require the leasing of land to mobile home tenants. The tenants were invited. This court distinguished *Loretto, supra*, because there the government compelled the occupation of the landlord's property by a cable box as a condition of leasing apartments. *Yee* was different because the government did not compel the landlord to consent to the occupation of his property by anyone or anything other than the invited tenants.

In the present case, Dolan invites customers to her store, but not the general public for recreational purposes. Dolan's option to withdraw her application to avoid the unwanted physical occupation does not render the occupation voluntary. She has a right to build, and requiring her to submit to the physical occupation as a condition of permission is not voluntary, it is compelled. Therefore, there is a compelled physical occupation, unlike *Yee*.

This is a per se taking under *Loretto, supra*. The fact it is a condition of development approval is irrelevant. However, this court in *Nollan* found a compelled physical occupation, but still analyzed the exaction as a regulatory taking. When Tigard's exactions are analyzed under those same standards, they are still a taking.

B. If the exactions are not a per se taking, they are a regulatory taking

Tigard asserts the exactions are not a regulatory taking as they are merely conditions reasonably related to the impacts of Dolan's proposed development. However, the exactions do not substantially advance a government

interest. Rather, they single out Dolan to provide a benefit at no cost, the cost of which should be borne by the community as a whole. They exemplify municipalities' tendencies to violate property owners' rights.

1. The exactions do not substantially advance a government interest

Tigard asserts the exactions advance the government interest in reducing traffic congestion and improving drainage. However, there is insufficient evidence of this. The exactions fail the "essential nexus" test of *Nollan*. The exactions are actually for the purpose of recreation, for which Tigard must pay Dolan.

a. *Nollan* requires a two prong nexus to show the regulation substantially advances a government interest

Tigard asserts it need only show its exactions are rationally related to a government purpose, and assumptions and hypotheses are sufficient to prove this relationship. However, *Nollan* and the Constitution require more.

The right to exclude others is an essential characteristic of property ownership. *Loretto*, 458 U.S. at 433. The use of property may be regulated for the public good under the police power, but if the regulation goes too far, it will be a taking. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413-5, 43 S.Ct. 158, 67 L.Ed. 322 (1922). A regulation is a taking if it denies all economically viable use of the land or fails to substantially advance legitimate state interests. *Nollan*, 483 U.S. at 834 (emphasis added). A condition of

permit approval must pass a two prong nexus test to substantially advance a legitimate state interest: (1) the impacts of the development must be sufficient such that they would justify denial of the permit, and (2) the conditions must advance the same interests as denial. *Id.* at 833-6. This court did not specifically announce what type of connection between the conditions and the state interest is required, but did state the relationship is subject to higher scrutiny than the rational relationship test for due process or equal protection claims. *Id.* at 834-5, n. 3.

Evidence of this two prong nexus must be substantial, as the Fifth Amendment is more than a pleading requirement, with compliance "more than an exercise in cleverness and imagination." *Id.* at 841. This court is particularly careful about the adjective "substantial" when conveyance of property is a condition of permit approval, as there is a heightened risk that the purpose is avoidance of compensation rather than the stated police power purpose. *Id.* Findings not supported by evidence will not support the abridgement of property rights. *Id.*

In *Nollan* the beach access easement was considered a taking because it had no relationship, substantial or rational, to the government's stated impacts to be addressed.

Here, Tigard's stated purpose for the path is to relieve traffic congestion caused by the intensified use of Dolan's property. However, there was no evidence of how much increased traffic would occur and what impact it would have on surrounding roads. Tigard states Dolan's expansion "is expected to generate additional vehicular traffic." App. G-24, Pet. for Cert. This is not substantial evidence which would be sufficient to deny the permit.

If, for some reason, that "evidence" of increased congestion were sufficient to deny the permit, the exactions do not help reduce congestion, so they do not relate to the governmental purpose justifying denial. Tigard asserts, without evidence, it is "reasonable to assume" customers and employees will use the path for their transportation needs. G-24. This is a legal conclusion, not a finding. The sight of bicyclists with sinks strapped to their backs is one Tigard officials must find less absurd than other reasonable people would.

The provision for a bike rack in the store plans is not evidence that Dolan expects customers and employees to utilize the bike path. The rack is required by Tigard. Tigard can not use an amenity it requires as evidence the amenity will be used. There is no evidence that the path would be used to reduce traffic caused by the store expansion.

Additionally, there is no evidence that the expansion will increase drainage problems sufficiently to deny the project. Tigard simply asserts it is "expected" to increase runoff, and "anticipated" runoff will add to a need to manage drainage. App. G-37, Pet. for Cert. There is no indication how much drainage will increase. The land in the flood plain will remain undeveloped, even without the dedication. No development is allowed. Tigard has not shown that the undeveloped land in the flood plain can not handle the increased runoff. There is no evidence showing the dedication of land for greenway purposes is needed to address drainage.

If Tigard had any evidence of increased runoff which would cause drainage problems, Tigard might be justified

in imposing conditions that address that increased runoff. However, the exactions do not improve drainage. The land will still be available for drainage purposes, without the dedication. Therefore, the exaction of land for greenway will not ameliorate runoff impacts.

The path exaction will actually exacerbate runoff impacts. It will increase impervious surfaces, as the path will probably be paved. This will increase runoff. Therefore, not only do the exactions not advance the governmental interest of improving drainage, they actually contribute to the drainage problem.

When the exactions are compared against the stated purposes, it is apparent they do not substantially advance those purposes. There is no evidence of the impacts of the expansion or the necessity of the exactions to mitigate those impacts. The exactions are a method of obtaining land for recreational purposes from Dolan without paying for it.

b. Tigard wants the land for recreation, not to address traffic and drainage impacts

The true purpose for the exactions is recreation, not to address drainage and traffic impacts. Tigard admits it wants the land for recreation. Tigard CDC 18.120.180.A.8, the ordinance under which Tigard required the exactions, is not aimed at drainage and traffic impacts of a proposal. It implements Tigard's Comprehensive Plan. That plan requires dedication of land along Fanno Creek for "greenway" and "bike/pedestrian pathways". App. J-1,2, Pet. for Cert. The justification for the path is that people will use it for their "recreational" needs. Tigard Plan. Comm.

Final Ord. No. 91-09 PC, App. G-24, Pet. for Cert. The exactions are not aimed at Dolan's impacts, just Tigard's desire for land for recreation.

The dedications will simply take away Dolan's right to exclude others from her property and provide land for a path and park. The path and park serve recreation purposes.

c. The Oregon Supreme Court misconstrued and misapplied *Nollan*

The OSC analyzed this case under *Nollan*, *supra*, deciding the exactions were constitutional. It could only do so by misconstruing and misapplying *Nollan*.

The OSC determined that *Nollan* did not require a higher standard of scrutiny than a reasonable relationship between the exactions and the stated purpose behind them. 854 P.2d at 442. In applying the "reasonably related" test, it determined that a nexus between the exactions and the proposal's impacts was essential for the exactions to be reasonably related to the impacts, but once that essential nexus was shown, the exactions substantially advanced the legitimate state interest. *Id.* at 443. This conflicts with statements in *Nollan* that the condition for abridging property rights is "substantially advancing" a legitimate state interest. 483 U.S. at 834, 841. Scrutiny of exactions is higher than the reasonable relationship test under the Due Process or Equal Protection Clauses. *Id.* at 835-6, n. 3.

The dissenters in *Nollan* understood that *Nollan* required a heightened level of scrutiny. The court was

making a "more demanding requirement" and insisting on "a precise accounting" of the development's impact on governmental interests. *Id.* at 863 (Brennan, J. dissenting). The court was demanding the police power be more than rationally based. *Id.* at 865 (Blackmun, J. dissenting).

The OSC did not apply the first prong of the essential nexus test in *Nollan*, which is whether the impacts were sufficient to deny the permit. That was assumed, for the sake of argument, in *Nollan*. That does not mean it is not a constitutional requirement. The OSC did not determine whether there was sufficient evidence to deny the permit.

In applying the second prong, the OSC wrongly believed it only needed to find a rational relationship between the dedications and the impacts which would justify denial. This led it to approve of exactions which could conceivably be related to drainage and traffic congestion, but do not substantially advance those legitimate state interests.

The OSC's error may be based on the *Nollan* court's assumption that even if it only required a rational relationship between the exactions and those assumed impacts, the exactions failed even that most untailored test. *Id.* at 835-9. That does not mean only a reasonable relationship was required.

The *Nollan* court also found its conclusion that the exactions were not a proper exercise of police power was consistent with the result in *Parks v. Watson*, 716 F.2d 646 (CA9 1983), which applied a rational relationship test between the exactions and the state's interests. *Id.* at 652-3. That is not an endorsement of the test applied in *Parks*, it is merely showing that even under the test urged

by the California Coastal Commission, the result would be the same.

The OSC was wrong to state *Nollan* did not impose a higher requirement than a rational relationship between exactions and impacts. *Nollan* requires more than a rational relationship, because exactions are subject to heightened scrutiny, and must "substantially" advance a state interest. Neither "essential nexus" required under *Nollan* was shown by Tigard.

2. Dolan has been singled out to bear the burden of providing land for recreation

The exactions are not intended to alleviate drainage and traffic congestion. Rather, Dolan, by virtue of owning property where Tigard wanted to put a path and park, and wanting to exercise her constitutional right to develop it, is being singled out among all taxpayers and landowners to provide the land without compensation.

If a property owner is singled out to bear a burden of achieving a legitimate state interest, even though he did not contribute to it more than other landowners, the government's actions violate the incorporated Takings Clause and Equal Protection Clause. *Nollan*, 483 U.S. at 835-6, n. 4. The Takings Clause is intended to bar government from forcing some public burdens on individual landowners which should be borne by the public as a whole. *Id.*

The Tigard ordinance provides the strongest evidence this is an extortion of property from Dolan unrelated to the impacts of her proposal. Tigard CDC 18.120.180.A.8

provides that a condition of development within the flood plain is dedication of land for greenway and a path. There is no requirement of an impact on drainage or traffic congestion. The impacts are irrelevant. Tigard simply wants the land. It believes it can treat development approval as a carrot, waving it before landowners as an incentive to give up their property. Tigard's findings regarding drainage and traffic are merely an exercise in "cleverness and imagination" in an attempt to comply with the nexus requirement between the exactions and the proposal. Tigard is abusing Dolan's right to develop her property.

Further evidence Dolan is being singled out is that other developments with similar or worse impacts on traffic and drainage are not required to dedicate land. A landowner across the street, whose customers and employees would use the same streets and could use the same path, and whose development increased impervious surfaces, is not required to make the same or similar dedications. In order to treat all landowners similarly, anyone who applies for a development permit should be required to dedicate land for greenway and bike/pedestrian paths. If they do not own land where Tigard wanted a path and greenway, they should be required to purchase such land and dedicate it to Tigard.

Dolan is being treated similarly to the landowner in *Nollan*. There, beach access was a legitimate state interest, while here the path and greenway are as well. In both cases, the impact of the development does not contribute to the need for the exaction any more than the actions of other landowners. The location of the property caused

the government to single out the landowner to bear the burden, which should be shared by the public as a whole.

If Dolan's expansion will add to traffic and runoff, Tigard can only exact contributions from Dolan in proportion to the impacts of her expansion. Even Tigard would probably concede it could not require Dolan to pay to resurface all the streets of Tigard because it can be assumed her expansion will cause an increase in traffic, contributing to the need to resurface the streets. That "exaction" would be out of proportion to the impacts of her proposal, and would be singling her out to bear the cost of a public improvement which should be shared by all taxpayers. That same principle of proportionality applies here, where Tigard has made no effort to show it is fairly apportioning the cost of providing land for a path and greenway based on the impacts of Dolan's expansion.

The cost of providing a greenway and path along Fanno Creek should be borne by the public as a whole. If Tigard wants the land, it should purchase it. Dolan will bear her fair share of the cost through taxes. Tigard's attempt to single out Dolan to bear the cost violates the Takings Clause of the Constitution.

3. Tigard's action shows the tendency of municipalities to use development approval to obtain benefits without cost

Tigard is not unusual in requiring exactions unrelated to a development's impacts as a condition to development approval. There is a tendency for municipalities to impose more costs of government onto individual

property owners, rather than the public as a whole. Municipalities know challenges are expensive for landowners, who often must pay rather than fight, due to lack of knowledge, resources, and/or time necessary for court challenges.

This court has stated it will be careful in scrutinizing exactions as conditions for development approval, as these conditions can be intended to avoid the compensation requirement. *Nollan*, 483 U.S. at 841. A brief look at the history of exactions, showing that exactions have gone from those inherently necessary to serve the development itself to exactions only tangentially related to the development's impacts, shows such scrutiny is warranted.

The first exactions were generally dedications of land for public improvements within a subdivision necessary for the subdivision. Note, " 'Take' My Beach Please!", 69 BUL Rev. 823, 848 (1989). The theory was that the development created the need for these public improvements, such as roads and sewers, so the developer should provide the land. *Id.* Exactions were expanded to require developers to actually construct or improve public facilities inside and outside the development. *Id.* at 849. We now have "linkage" exactions, requiring developers to provide low income housing as a condition of commercial development, on the theory that it will attract workers who will need that housing. *Id.* at 849-50; Delaney, Gordon and Hess, "Needs-Nexus Analysis", 50 Law & Cont. Prob. 139, 141-4 (Winter 1987). Some municipalities, such as Seattle, carry exactions beyond what is allowed under any nexus test, stating the test is " 'How much will you give us before you will be filing a lawsuit?' And that's

what the condition [of getting a permit] is." Statement by Director of Seattle City Attorney Land Use Division, at a seminar in March of 1988.

The lack of careful judicial scrutiny of exactions has contributed to the abridgement of property owners' rights in the name of the police power. Some courts only require a reasonable relationship between impacts and exactions, rarely scrutinizing the evidence of such impacts or the relationship. Municipalities are encouraged to obtain benefits at no cost, even when impacts are negligible and the nexus tenuous. Some go as far as disregarding the legal test altogether, seeking to extort whatever they can without being taken to court.

A decision in favor of Dolan will help constrain governmental abuses of property rights. It will especially help those property owners without the time, money, or energy to fight the government, even if they know the exaction is unconstitutional. This court should state in no uncertain terms what the government must prove before it abridges property rights in the form of exactions. This will help curb the tendency of government to use development approval to shift costs only tangentially related to a development, and wholly out of proportion to the development's impacts, onto the landowner who chooses to develop his land.

IV. CONCLUSION

Nollan, supra, was not the best case to lay down a strong rule against exactions only tangentially related to a development. The facts showed the relationship

between the exactions and governmental goals was completely lacking. This allowed courts, such as the OSC, to misconstrue the requirements upon the government when it comes to exactions. This court should show it meant what it said when it stated exactions will be given heightened scrutiny. There must be substantial evidence, not just assumptions and hypotheses, that the development will cause sufficient impacts justifying denial. Then, the exactions must substantially advance the same state interests denial would advance. Only those exactions substantially advancing legitimate state interests will be upheld.

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